QUESTION PRESENTED

Is the ordinance enacted by the Town of Casey which regulates pesticide use independent of federal and state programs, Ordinance 85-1, preempted by or in conflict with the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136-136y (1988).

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In the Supreme Court of the United States

OCTOBER TERM, 1989

NO. 89-1905

WISCONSIN PUBLIC INTERVENOR, AND TOWN OF CASEY, PETITIONERS,

v.

RALPH MORTIER AND WISCONSIN FORESTRY/RIGHTS-OF-WAY/ TURF COALITION, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

The FIFRA Regulatory Scheme

Pesticides have been regulated by the federal government since the Federal Insecticide Act of 1910, although a few states had regulated pesticides even prior to this time. H.R. Rep. No. 511, 92d Cong., 1st Sess. 9 (1971). In 1947, Congress replaced the Insecticide Act with the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), Pub. L. No. 80-104, 61 Stat. 163 (1947). FIFRA required pesticide registration and labeling, and was designed to work in harmony with a uniform insecticide, fungicide and rodenticide act developed for states by the

Council of State Governments. H.R. Rep. No. 511, *supra*, at 9-10.

After a series of minor amendments to FIFRA in 1959 and 1964,[1] Congress enacted a comprehensive set of amendments to FIFRA in 1972. Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973 (codified as amended at 7 U.S.C. 136, *et seq.*, (1988)). These amendments "transformed FIFRA from a labeling law into a comprehensive regulatory statute." *Ruckelshaus v. Monsanto*, 467 U.S. 986, 991 (1984).

> As amended, FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration, and gave EPA greater enforcement authority.

Id. at 991-92. Since 1972, Congress has enacted additional amendments to strengthen federal reregistration authority, record and inspection authority and other areas.[2]

As presently enacted, FIFRA requires that all pesticides be registered with the U.S. Environmental Protection Agency ("EPA") and be classified according to general or restricted use. 7 U.S.C. § 136a. As part of this registration process, all pesticides must contain an approved label. *Id.*

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[1] Nematocide, Plant Regulator, Defoliant and Desiccant Amendment of 1959, Pub. L. No. 86-139, 73 Stat. 286 (1959); Federal Insecticide, Fungicide and Rodenticide Act Amendment of 1964, Pub. L. No. 88-305, 78 Stat. 190.

[2] Insecticide, Fungicide and Rodenticide Act, Pub. L. No. 94-140, 89 Stat. 751 (1975); Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819; and Federal Insecticide, Fungicide and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2654.

Among other things, the label expressly delineates the manner in which the pesticide may be used.[3]

To ensure pesticides will be properly applied in accordance with the label, FIFRA establishes a nationwide system for training and certifying pesticide applicators. 7 U.S.C. § 136b. It is unlawful to use a pesticide which is not registered, to alter a pesticide, to use a pesticide contrary to label instructions or to engage in other acts prohibited by FIFRA. 7 U.S.C. § 136j.

FIFRA also specifies several roles for states. States may impose additional regulations on the sale and use of pesticides to meet local needs. 7 U.S.C. § 136v(a). States which meet EPA standards may also certify pesticide applicators. 7 U.S.C. § 136b. States may also enter into cooperative agreements with EPA to enforce FIFRA provisions. 7 U.S.C. §§ 136u, 136w-1.

In conformity with FIFRA, the Wisconsin Legislature has enacted extensive provisions regulating pesticides. Wis. Stat. §§ 94.67-94.71 (1989-90). These provisions are enforced by the Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP") which has promulgated administrative rules in Wis. Admin. Code chs. Ag 21, Ag 27, Ag 29, Ag 30, Ag 161 and Ag 163. Among other provisions, Wisconsin has imposed restrictions on the use of certain pesticides in certain counties of the state in response to local groundwater concerns. *See, e.g.*, Wis.

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[3] Labeling requirements are set forth in 40 C.F.R. Part 156 (1990). Labels must contain the name of the product and producer, contents, registration number, producer number, ingredient statement, warnings, directions for use and use classification. 40 C.F.R. § 156.10(a). The directions for use include prescriptions for the sites of application, target pests for each site, dosage rates, methods of application, frequency and timing of applications, specific limitations on reentry and specific directions on storage and disposal. 40 C.F.R. § 156.10(i)(2).

Admin. Code § Ag 29.17 (restricting aldicarb use in the "central sands" area of Wisconsin) and Wis. Admin. Code ch. Ag 30 (effective 4/1/91) (restricting atrazine use). Wisconsin has not, however, delegated specific authority to local governments to administer, implement or enforce the state's pesticide program.

The Town of Casey Ordinance

Casey is a rural town located in Washburn County in northwest Wisconsin with a population of 404 persons.[4] In 1983, the Town of Casey set out to develop a pesticide control ordinance. Several successive versions were enacted, culminating in Ordinance 85-1 which requires that a person obtain a local permit prior to applying pesticides to certain private or public lands. Section 1.2 provides:

> 1.2 Application of Pesticides. No person may apply any pesticide to public lands, or to private lands subject to public use (including, but not limited to Forest Croplands, as defined in Chapter 77, Stats.), or may aerially apply any pesticide to private lands within the Town of Casey except after obtaining a permit under section 1.3.

Town of Casey, Washburn County, Wisconsin, Ordinance 85-1 (1985) (II Pet. App. C at 6).[5] Section 1.3 requires that any person subject to the ordinance submit to the Town Board a detailed application with respect to any pesticide use at least 60 days prior to the proposed use (II Pet. App. C at 7).

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[4] Data from 1980 Census reported in the *Washburn County Directory 1982-83* (J. L. Brown, County Clerk).

[5] Appendix citations are to the Petitioner's Appendix since a separate joint Appendix was not filed.

The permit application under Section 1.3 must include the submittal of detailed technical information such as:

> (d) an inventory of the pesticide(s) to be used listing the brand name, generic component ingredients, the quantities to be used, method of application, known benefits and known risks associated with the chemical(s) to be used;
>
> (e) the chemical and non-chemical alternative methods or treatments available to accomplish the desired objectives and the reasons why the application of the proposed pesticide(s) is preferable to alternative chemicals and to other methods;
>
> (f) the status of the proposed pesticide(s) and of any chemical alternatives in the federal Environmental Protection Agency's (EPA) pesticide reregistration program ...
>
> (g) the positive and negative effect of reducing or eliminating the use of the proposed pesticide(s) and of any chemical alternatives;
>
> (h) the anticipated impact of the application upon humans, animals and plants of the proposed pesticide(s) and of any chemical alternatives; ...

(II Pet. App. C at 8-9).

After an application is received, the Town Board has 15 days to make an initial determination on the application. Under Section 1.3(3), the Town Board retains absolute discretion to approve, condition or deny the request to use pesticides:

> (3) Initial Determination by Town Board. ... The board may impose any reasonable conditions on a permitted application related to the protection of the health, safety and welfare of the residents of the Town of Casey. ...

(II Pet. App. C at 11-12). Restrictions on aerial spraying are specifically enumerated as a potential restriction. *Id.* The applicant or any town resident may request a hearing

before the Board on an application, but the Town Board still retains absolute discretion to approve, approve subject to conditions or deny the permit. Section 1.3(5) (II Pet. App. C at 12).

The ordinance also requires that a notice be posted after any pesticide use. Section 1.3(7) (II Pet. App. C at 14). Violators of the ordinance are subject to fines up to $5,000 for each violation. Section 2 (II Pet. App. C. at 16).

Procedural Status

Respondent Ralph Mortier owns 200 acres of forest land in the Town of Casey. Mortier sought to aerially apply herbicides on his property to control non-forest vegetation. Because these lands were zoned for forestry and were registered under Wisconsin's Forest Crop law, Mortier submitted an application to the Town Board for the use of herbicides.[6] On March 23, 1985, the Town Board granted Mortier a conditional approval which precluded any aerial spraying and restricted the lands on which ground spraying would be allowed. This decision was upheld by the Town Board on May 18, 1985.

Respondent Mortier, in conjunction with the Wisconsin Forestry/Rights-of-Way/Turf Coalition, brought a declaratory judgment action in June 26, 1986 challenging Ordinance 85-1.[7] The circuit court ruled in favor of Mortier on the grounds that the Ordinance was preempted by

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[6] Mortier's application was under Ordinance 83-1 (1983), a predecessor to Ordinance 85-1, which required a permit for pesticide use but did not contain a posting requirement.

[7] The coalition is an unincorporated nonprofit association of individual businesses and other associations whose members use pesticides. The Coalition includes farmers, Christmas tree growers and rural electric cooperatives, among others.

and in conflict with federal and state law (II Pet. App. B at 14).

The Wisconsin Supreme Court upheld the circuit court decision.[8] *Mortier v. Town of Casey*, 154 Wis. 2d 18, 452 N.W.2d 555 (1990). The majority concluded that "the preemptive action of Congress deprived the Town of Casey of its police power to regulate pesticides." *Id.*, 154 Wis. 2d at 32, 452 N.W.2d at 561 (I Pet. App. A at 30). It reached this conclusion based on the statutory language of FIFRA and its legislative history. *Id.*, 154 Wis. 2d at 28-30, 452 N.W.2d at 559-60 (I Pet. App. A at 22-25).[9] Three justices dissented.[10]

---

[8] The Wisconsin Supreme Court accepted a joint motion to bypass the Wisconsin Court of Appeals under Wis. Stat. § 809.60 (1987-88).

[9] Although the Court noted that FIFRA contained no express preemption language, it rejected the notion advanced by Petitioners that preemption requires an express statutory declaration. *Mortier*, 154 Wis. 2d at 24, 452 N.W.2d at 557 (I Pet. App. A at 14).

[10] Although the dissenting Justices took a different view of the statute and legislative history, their dissent appears in part to be based on the mistaken impression that, "the majority opinion apparently attempts to find express preemptive intent not in the text of the statute, but in the legislative history." *Mortier*, 154 Wis. 2d at 37 n.3, 452 N.W.2d at 563 (I Pet. App. A at 9) (Abrahamson, J., dissenting). The majority found *implied* preemption based on both the statutory text and legislative history. *Id.*, 154 Wis. 2d at 29-30, 452 N.W.2d at 560-561 (I Pet. App. A at 22-25).

SUMMARY OF ARGUMENT

In enacting FIFRA, Congress established a coordinated and comprehensive federal-state scheme of pesticide regulation which preempts independent local pesticide regulation such as that enacted by the Town of Casey.

Congressional intent is the "ultimate touchstone" of preemption analysis. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 483 (1990). Here, Congressional intent to preempt the field of independent local regulation of pesticides is clearly revealed in the "structure and purpose" of FIFRA. *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990). Congress limited the authority to regulate pesticide use to "States," 7 U.S.C. § 136v(a), and defined "States" so as to exclude local governments. Section 136(aa). Moreover, the statutory structure of FIFRA demonstrates an intentional differentiation between regulatory authority delegated to "States" and non-regulatory authority which may be independently exercised by "States or political subdivisions thereof."

FIFRA's legislative history confirms that its "purpose" was to limit pesticide regulation to the federal and state scheme and preclude independent pesticide regulation by local governments. Attempts to authorize local regulation were rejected in both the House and the Senate when FIFRA was amended in 1972. Congress concluded, in the words of the Senate Agriculture and Forestry Committee, that "regulation by the federal government and the 50 states should be sufficient and *should preempt the field.*" 1972 U.S. Code Cong. & Admin. News at 4026 (emphasis added).

The preempted field is, however, a limited one. Congress did not preclude states from delegating authority to local governments to administer and enforce a state pesticide program. Nor did Congress preempt local

government regulation in areas outside of pesticide regulation, such as groundwater protection, provided that the regulatory impact on pesticides is incidental. As such, the preempted field does not unduly interfere with either state or local authority.

In addition and apart from Congressional intent to preempt the field of independent local pesticide regulation, the Town of Casey ordinance conflicts with FIFRA by standing as "an obstacle to the accomplishment of the full purpose and objectives of Congress." *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984). The Casey ordinance is an independent regulatory scheme which is not coordinated with federal or state law in any respect. The permit scheme which it creates vests ultimate authority for pesticide use with the three-member Casey Town Board, and is contrary to the uniform and coordinated federal-state scheme contained in FIFRA.

A special feature of the federal-state scheme created by Congress is that it provides the necessary expertise and perspective for effective regulation while still allowing local needs to be met. The Casey ordinance thwarts this congressional purpose. It places the technical question of pesticide regulation into the hands of a town board which lacks the expertise, staff and financial resources to undertake this task. More importantly, it grants to the town board the discretion to exercise regulatory authority unconstrained by state or regional considerations. Thus, a local government could ban or restrict the use of a pesticide and in so doing allow pests such as the gypsy moth to spread to numerous neighboring jurisdictions. The result is greater threats to public health and welfare and the use of more pesticides over larger areas.

Finally, Congress foresaw that uncoordinated, independent local regulations would unduly burden interstate commerce and designed FIFRA to avoid that burden. Local

ordinances such as the Casey ordinance frustrate and defeat Congress' efforts. If ordinances such as Casey's were enacted by other local governments, substantial and undue burdens would be placed on persons who apply pesticides in multiple jurisdictions.

ARGUMENT

I. PREEMPTION OCCURS WHEN CONGRESS HAS OCCUPIED A LEGISLATIVE FIELD OR WHEN LOCAL REGULATION CONFLICTS WITH THE FEDERAL SCHEME.

The supremacy clause of the United States Constitution invalidates state or local laws that "interfere with, or are contrary to," federal law. *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 (1824).

State or local law can be preempted in either of two general ways. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). "Field preemption" exists when "Congress evidences an intent to occupy a given field, [and] any state law falling within that field is preempted." *Id.* (quoting *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983)). Preemption of a given field may be either express or implied and is "compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990), (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).[11]

"Conflict preemption" occurs when state or local law conflicts with federal law. *Silkwood*, 464 U.S. at 248. Such a conflict arises when, "it is impossible to comply with both state and federal law" *Id.*, *see also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); when the state law "stands as an obstacle to the

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[11] In addition to implying preemption from the statute's "structure and purpose," preemption can also be implied where "the scheme of federal regulation may be so pervasive" or "the federal interest is so dominant" that preemption is required. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

accomplishment of the full purposes and objectives of Congress" *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); or when "local regulation ... would frustrate the federal scheme." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

For both field preemption and conflict preemption, "the question whether a certain ... action is preempted by federal law is one of Congressional intent. 'The purpose of Congress is the ultimate touchstone.'" *Allis-Chalmers v. Lueck*, 471 U.S. 202, 208 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. at 504 (conflict preemption); and *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95-96 (1983) (field preemption).[12]

When historic state powers are involved, this Court has applied "the assumption that the historic police powers of the states were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress" *California v. ARC Am. Corp.*, 109 S. Ct. 1661, 1665 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).[13] However, contrary to Petitioner's suggestion, this assumption is neither "stronger" nor "heavier" than the assumption applied in most preemption cases. Pet. Br. at 26-27. The "clear and manifest" standard is the standard this Court *usually* applies unless a state seeks to regulate in an area involving "uniquely federal interests."

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[12] For purposes of the supremacy clause, "the constitutionality of local ordinances is analyzed in the same ways as that of statewide laws." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712-13 (1985); *see also City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

[13] Here, whether the assumption against preemption should apply at all is debatable since Congress has preempted local regulation, not state regulation. The federal-state scheme under FIFRA strengthens state powers *vis à vis* local governments.

Where there is a unique federal interest, the proof of Congressional intent to preempt need not be as strong as where a state seeks to regulate in areas traditionally left to the states. *See, e.g., Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988).

Moreover, contrary to the Solicitor's claim, the assumption against preemption is no stronger for health and safety regulations enacted under general police powers than regulations enacted under some other historic state power. *See* U.S. Br. at 7. For example, this Court has applied the same assumption to a state's historical powers to regulate generation of power, *California v. FERC*, 110 S. Ct. 2024 (1990); a state's power under the 21st Amendment to regulate the importation of liquor, *North Dakota v. United States*, 110 S. Ct. 1986 (1990); and state common law and statutory remedies against monopolies and unfair business practices; *California v. ARC Am. Corp.*, 109 S. Ct. 1661 (1989).

Apparently not satisfied with the existing preemption standards, Petitioners argue that only express statutory language can meet the "clear and manifest intent" test. Petitioners assert that, "the very idea in preemption law of 'implied intent that is clear and manifest' is itself oxymoronic and difficult to administer." Pet. Br. at 89 n.18.[14] Of course Petitioners' rule would cavalierly overturn over 50 years of precedent consistently recognizing that preemption may be implied as well as express. This Court has recently reaffirmed the importance of prior precedent. *California v. FERC*, 110 S. Ct. at 2029. Abandonment of implied preemption is simply not warranted.

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[14] *See also* Hawaii Br. at 4-5.

II. THE TOWN OF CASEY ORDINANCE IS PREEMPTED BY FIFRA.

The language and the statutory structure of FIFRA, and its legislative history both clearly demonstrate that Congress intended to preempt independent local pesticide regulation such as the Casey ordinance. FIFRA creates a federal program which can be supplemented by state regulation to meet local needs. Independent regulation by local governments is incompatible with this regulatory scheme and is preempted. Congress hardly intended to create the "chaotic regulatory structure" that would flow from such regulation. *International Paper Co. v. Ouellette,* 479 U.S. 481, 497 (1987).

However, the preempted field is limited. States remain free to delegate authority to local units of government to administer and enforce a state pesticide program. Similarly, local units of government retain their traditional zoning and police powers in other fields, provided that the exercise of these powers have no more than an incidental regulatory effect on pesticides.

A. Congressional Intent to Preempt Independent Local Regulation Is Demonstrated By the Language and Structure of FIFRA.

FIFRA creates a coordinated regulatory scheme in which federal regulation may be supplemented by state regulation. While states may delegate functions to local governments in carrying out the state program, Congress chose to preclude independent regulation by local governments.

The relevant section of FIFRA, 7 U.S.C. § 136v, provides that only a *"State"* may enact pesticide regulations in addition to federal regulations:

> (a) A *State* may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter. [Emphasis added.]

The term "State" is specifically defined in FIFRA at 7 U.S.C. § 136(aa) and does not include political subdivisions:

> The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa.

"As a rule, [a] definition which declares what a term 'means' ... excludes any meaning that is not stated." *Colautti v. Franklin,* 439 U.S. 379, 392 n.10 (1979) (quoting 2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978). FIFRA's definition of the term "State" thus excludes political subdivisions. Had Congress intended to include political subdivisions, it would have so stated as it has in other instances.[15]

Petitioners and the Solicitor attempt to avoid the statutory definition of "State" by claiming that local governments are necessarily included in the term "State." Pet. Br. at 36-37, U.S. Br. at 11. This argument might be persuasive but for the fact that Congress made a distinction throughout FIFRA between those authorities granted to "States" and those granted to "States and any political subdivision thereof." Regulatory authority was delegated to

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[15] *See e.g.*, 10 U.S.C. § 2232(1) (1988); 15 U.S.C. § 1693a(10) (1988); 15 U.S.C. § 1692a(8) (1988); 15 U.S.C. § 3316(b)(2)(C)(i) (1988); 18 U.S.C. § 1961(2) (1988); 25 U.S.C. § 1742(2) (1988); 25 U.S.C. § 1772a(2) (1988); 27 U.S.C. § 214(10) (1988); 29 U.S.C. § 1144(c)(2) (1988); 30 U.S.C. § 552 (1988); 42 U.S.C. § 4601(2) (1988); 42 U.S.C. § 8441(e)(4) (1988); 47 U.S.C. § 397(7)(A) (1988).

"States." Non-regulatory authority could be exercised by either states or their political subdivisions.

Congress gave "States" the authority to issue experimental use permits, § 136c(f); to certify pesticide applicators, § 136i(a)(2); to receive exemptions for emergency conditions, § 136p; to enter into cooperative grant-in-aid agreements with EPA for enforcement, training and administration, § 136u; and to exercise primary enforcement authority for pesticide use violations provided the state has adequate laws regulating pesticide use, § 136w-1(a).

By way of contrast, the authority given to "States or any political subdivision thereof" is very limited. "Political subdivisions" may inspect books and records, § 136f(b); cooperate in conducting monitoring activities, § 136r; and cooperate in "carrying out the provisions of this subchapter, and in securing uniformity of regulations," § 136t(b).[16]

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[16] Apart from the pattern of differentiation between the states and their political subdivisions, the sections which grant powers only to the State individually illustrate the preeminent role of states in the regulatory scheme. Only a "State" has the authority to register a pesticide for uses beyond those authorized in the EPA registration to meet "special local needs." 7 U.S.C. § 136v(c). Thus, Congress chose to address such local needs through states rather than local governments. If local governments could independently regulate to meet local needs, there would have been no need for Congress to authorize state control of local use. Only a "State" (and Indian tribes) may enter into cooperative grant-in-aid agreements with EPA for enforcement, training and administration, § 136u. Such agreements are not available to local governments. Finally, only a "State" may exercise primary enforcement for pesticide use violation, and then only if the program is deemed adequate by EPA, § 136w-1. Local governments were not given the option to enforce the provisions of FIFRA. *See also Coparr, Ltd. v. City of Boulder*, 735 F. Supp. 363, 367 (D. Colo. 1989), *appeal docketed*, No. 89-1341 (10th Cir.), *appeal stayed* (Jan. 15, 1991) (pending outcome of this case).

Petitioners' attempt to dismiss these statutory distinctions violates several principles of statutory construction. Pet. Br. at 36-40. If the term "political subdivision" is simply subsumed in the term "state," the statutory language in sections 136f(b), 136r and 136t(b) would be rendered surplusage. Such a construction should be rejected. Recently, this Court refused to construe the preemptive effect of ERISA in a manner which would have rendered statutory language superfluous. *Ingersoll-Rand, Co. v. McClendon*, 111 S. Ct. 478, 484 (1990); *see also Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 17 (1989).

Furthermore, where, "'Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

This rationale was recently applied to different usages of the term "State" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 833, as amended, 29 U.S.C. § 1002, *et seq.* (1988). *Ingersoll*, 111 S. Ct. at 484. A limited definition of "State," comparable to the FIFRA definition, was contained in ERISA at 29 U.S.C. § 1002(10). An expanded definition of "State," set forth in another provision of the ERISA statute included "any political subdivisions thereof, or any agency or instrumentality of either." 29 U.S.C. § 1144(c)(2). This Court held that the two definitions of "State" had distinct meanings and explained that the broader definition was adopted to include "state agencies and instrumentalities whose actions might not otherwise be considered state law." *Ingersoll*, 111 S. Ct. at 484. The *Ingersoll* decision supports the argument that Congress meant what it said in

FIFRA when it defined "State" in a manner which excludes local governments.[17]

In addition to ignoring FIFRA's statutory differentiations, Petitioners argue that two sections indicate an intent to allow local regulation. First, Petitioners observe that § 136v(b) specifically preempts a "State" from imposing different "labeling or packaging" requirements. Petitioners argue that since the term "State" necessarily includes local governments in this context, the term "State" must also include local governments under § 136v(a). Pet. Br. at 30-31, 35-36. The fallacy of Petitioners' argument is that it ignores the substance of § 136v(a). Section 136v(a) provides that the regulation of pesticide use is limited to States. Section 136v(b) simply creates a further restriction by limiting certain state regulations. There is no need for § 136v(b) to specifically restrict labeling or packaging requirements by local governments because they have already been preempted under § 136v(a).

Second, Petitioners claim that local governments implicitly have authority to regulate pesticides given the language of § 136t(b) which allows the EPA administrator to "cooperate with ... any state or any political subdivision thereof in securing uniformity of regulations." Pet. Br. at 31-32. This argument is also misplaced. The language of

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[17] A similar analysis was applied in *Local 1564 v. City of Clovis*, 735 F. Supp. 999 (D.N.M. 1990) where the court concluded that the National Labor Relations Act of 1947, § 14(b), 61 Stat., 151 (codified as amended at 29 U.S.C. § 164(b) (1988)), only allowed "states" or territories, not local governments, to prohibit union security agreements. The court noted that, "in ordinary usage, the words 'State or territorial law' would not include legislation enacted by political subdivisions of the state," and "when Congress intended to cover subdivisions of the state, it did so directly." 735 F. Supp. at 1004.

authority to enact their own independent regulations. This provision helps assure that local governments have input into state regulations designed to meet local needs or general federal regulations. Coordination between local and state officials makes sense prior to state action registering a pesticide for a special local need under § 136v(b) or restricting pesticide to respond to local problems under § 136v(a). In addition, where states choose to utilize local governments in the administration and enforcement of a state pesticide program such coordination is particularly important.

B. Congressional Intent to Preempt Local Regulation Is Demonstrated By the Purpose of FIFRA Expressed In the Legislative History.

Although Respondents contend that the language and structure of FIFRA clearly preempts local regulation, it is nevertheless appropriate to review FIFRA's legislative history. This Court has observed that the "structure *and purpose*" of the statute should be examined in determining Congressional intent to preempt. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (emphasis added). Legislative history is relevant in determining the underlying *purpose* of the statutory language. *See, e.g., Ingersoll*, 111 S. Ct. at 485; *FMC Corp. v. Holliday*, 111 S. Ct. 403, 410-11 (1990); *City of New York v. FCC*, 486 U.S. 57 (1988); *Silkwood*, 464 U.S. at 249-56; *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 208-12 (1983).

Second, if there is any ambiguity in FIFRA, the Legislative history confirms the Congressional intent to preempt local regulation. *Mortier v. Town of Casey*, 154 Wis. 2d 18, 28, 452 N.W.2d 555, 559 (1990) (I Pet. App. A at 21). A resort to legislative history which "give[s] meaning to an enacted statutory, text" is entirely

appropriate. *Puerto Rico Consumer Affairs Dep't v. Isla Petrol.*, 485 U.S. 495, 501 (1988).

1. The Legislative History Demonstrates a Clear Intent to Preempt Local Regulation.

Extensive Congressional study and debate preceded the 1972 FIFRA Amendments. One of the topics specifically debated was the allocation of responsibility for pesticide regulation between the federal, state and local governments. During this debate both houses of Congress rejected proposals which would have allowed independent local regulation and affirmed that the statutory scheme was intended to preempt local regulation.

(a) The House rejects local regulation proposed by the Administration. In February 1971, the Nixon Administration proposed amendments to FIFRA which were introduced in the U.S. House of Representatives as H.R. 4152. H.R. 4152, 92d Cong., 1st Sess. (1971) reprinted in *Hearings on Federal Environmental Pesticide Control Act of 1971, Before the House Committee on Agriculture*, 92d Cong., 1st Sess. 904 (1971). One section of the proposed bill would have allowed local regulation by providing that "nothing in this Act shall be construed as limiting the authority of a State or a political subdivision to regulate the sale or use of a pesticide within its jurisdiction insofar as such regulation does not permit such sale or use as is prohibited under authority of this Act." *Id.* at § 19(c).

On September 25, 1971, the House Agriculture Committee reported a new bill, H.R. 10729, 92d Cong., 1st Sess. (1971), to the House of Representatives. This bill deleted any reference to local regulatory authority. The Committee Report accompanying the bill explained that this change was specifically intended to preclude local regulation:

> The Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions.

H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971). After two days of debate, the full House approved H.R. 10729 on November 9, 1971 by a vote of 288-91.[18]

(b) Senate Agriculture and Forestry Committee rejects local regulation. After H.R. 10729 was forwarded to the United States Senate, the bill was referred to the Senate Committee on Agriculture and Forestry for consideration. That Committee endorsed the decision of the House to restrict local regulation. The Committee Report, issued on June 7, 1972, stated:

> The Senate Committee considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives. Clearly, the 50 States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities, whether towns, counties, villages or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis, and on the basis that permitting such regulation would be an extreme burden on interstate commerce, *it is the intent that Section 24, by not providing any authority to political subdivisions and*

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[18] *See* 117 Cong. Rec. 40,068 (1971). Even the Solicitor was forced to acknowledge that "the House Committee report may be read to provide some evidence of congressional opposition to local regulation of pesticides." U.S. Br. at 16-17.

> *other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and regulation of pesticides.*

S. Rep. No. 838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3993, 4008 (emphasis added).

(c) Senate rejects local regulation proposed by the Senate Commerce Committee. After the Committee on Agriculture and Forestry ordered H.R. 10729 reported to the full Senate, the bill was referred to the Senate Committee on Commerce. The Commerce Committee proposed a series of amendments to the bill, including an amendment which expressly authorized local regulation of the sale or use of pesticides. S. Rep. No. 92-970, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 1111.

The Senate Agriculture and Forestry Committee promptly filed a Supplemental Report on H.R. 10729 opposing the Commerce Committee's amendments. *See* 1972 U.S. Code Cong. & Admin. News at 4023. In rejecting the Commerce Committee amendment on local regulation, the Supplemental Report stated that, "regulation by the Federal government and the 50 States should be sufficient *and should preempt the field.*" *Id.* at 4026 (emphasis added).

After almost two months of meetings between the Agriculture and Forestry Committee and the Commerce Committee, a "Compromise Amendment in the Nature of a Substitute" was prepared. *Id.* at 4088. This compromise specifically rejected the Commerce Committee amendment on local regulation by noting that the Commerce Committee amendment was "not included in the substitute." *Id.* at 4091. The substitute bill was agreed to by a majority of the members of the Commerce Committee and by all of the members of the Agriculture and Forestry Committee. 118

Cong. Rec. 32,252 (statement of Sen. Allen) (Sept. 26, 1972).

On September 26, 1972, the full Senate proceeded to consider H.R. 10729. The original amendments proposed by the Commerce Committee were again offered, including the amendment authorizing local regulation of pesticides. *See* 118 Cong. Rec. 32,249-51 (Sept. 26, 1972). Senator Allen, the chair of the Agriculture and Forestry subcommittee which handled the bill requested the Commerce Committee amendments be withdrawn and the substitute bill be offered. *Id.* at 32,251-52. With the unanimous consent of the Senate, Senator Allen then inserted in the *Congressional Record* an excerpt from the Report of the Agriculture and Forestry Committee, which included the statement that the amendments "should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides." *Id.* at 32,256.[19] The Senate approved this version by a vote of 71-0. *Id.* at 32,263.

Subsequently, a Conference Committee was convened to resolve the differences between the Senate and House versions of FIFRA. No further discussion on local regulation arose since the House and Senate versions were consistent in limiting supplemental regulation to states. The House and the Senate both agreed to the conference report. 118 Cong. Rec. 35546 (October 12, 1972); 118 Cong. Rec. 33924 (October 5, 1972).

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[19] Senator Allen also introduced into the record excerpts from the Supplemental Report from the Agriculture and Forestry Committee explaining that the Commerce Committee amendment on local regulation was rejected. *Id.* at 32,257-60. (Senators Hart and Nelson who sponsored many of the Commerce Committee Amendments both expressed satisfaction with the final version notwithstanding the rejection of the local regulation amendment. *Id.* at 32,258-60.)

2. *Petitioners Mischaracterize the Legislative History.*

In the face of this remarkably clear legislative history, Petitioners and the Solicitor variously attempt to dismiss or confuse the legislative record. None of these mischaracterizations can, however, alter the expression of Congressional intent.

First, Petitioners argue that the Senate bill was a "compromise" in which, "the Senate Agriculture and Forestry Committee could not get preemption language into the law and the Senate Commerce Committee could not get specific authority language into the law." Pet. Br. at 56. That was not how the debate was framed. The Senate Agriculture and Forestry Committee adopted language by which it intended to "depriv[e]" local governments of jurisdiction over pesticide regulation. 1972 U.S. Code Cong. & Admin. News at 4008. The Agriculture and Forestry Committee never sought to "get preemption language into the law" (Pet. Br. at 56) nor was it necessary for them to do so.

The issue that was debated in the Senate was whether the preemptive intent in the Agriculture and Forestry Committee bill should be abrogated by the Senate Commerce Committee amendment. The resolution of this debate was not a compromise; the Commerce Committee amendment was defeated and the preemptive language approved by the Agriculture and Forestry Committee adopted. In rejecting the amendment, the Agriculture and Forestry Committee expressly stated that the law as written "should preempt the field." 1972 U.S. Code Cong. & Admin. News at 4026.

Moreover, the full Senate concurred in this resolution. The Commerce Committee amendments together with the Agriculture and Forestry Committee reports rejecting the

local authority amendment were read into the record by unanimous consent.[20]

Second, Petitioner argues that Committee reports should be disregarded unless the preemptive language appears in the final statute. Pet. Br. at 52-54. This argument again ignores the fact that Congress need not preempt by express language. *See e.g., City of New York v. FCC*, 486 U.S. 57, citing to *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369 (1986); *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982). It also ignores the longstanding rule that Committee reports from the operative Congressional Committees are "the authoritative source for finding the Legislature's intent." *Garcia v. United States*, 469 U.S. 70, 76 (1984); *see also City of New York v. FCC*, 486 U.S. 57; *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980).

In a related argument, the Solicitor claims that the legislative history was ambiguous and should be disregarded because the desire to preempt "was by no means uniform among the bill's authoritative supporters." U.S. Br. at 21. Although Congress acts by majority vote and rarely speaks with uniformity, here the final Senate vote which did not include the Commerce Committee Amendment was 71-0. *See* discussion *supra* at p. 23.

Third, Petitioners argue that it is significant that the House and Senate Conference Committee did not address the local preemption issue. Pet. Br. at 56. Yet, there is no reason it should have. The House and Senate version of the relevant language was identical. In the absence of a dispute

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[20] This was not simply a floor speech by Senator Allen, but a presentation to the entire Senate of the key Committee debates and resolution of those debates. 118 Cong. Rec. 32,257-60 (October 12, 1972).

between Houses, there was no need to address the issue in the Conference Committee report.

Finally, the Petitioner argues that the legislative history should be disregarded because the reports refer to "authorization" of local regulation rather than "preemption." Pet. Br. at 48-49. However, the Senate Agriculture and Forestry Committee *did* speak to "depriving such local authorities ... [of] jurisdiction" and of "preempt[ing] the field." 1972 U.S. Code Cong. & Admin. News at 4008, 4026. Furthermore, the reports of the prevailing committees in both the House and Senate rejected an "authorization" of local authority because that was how the amendments were framed. The result in either case was to preempt local pesticide regulation.

The rejection of the President's proposed bill and the Senate Commerce Committee's proposed amendment, "reveals a conscious decision by Congress" to eliminate such language and should be respected. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978) (superseded by statute on other grounds, 1986); *see also Russello v. United States*, 464 U.S. at 23-24. On this record, the Wisconsin Supreme Court properly concluded:

> [T]his legislative history could not be more clear. Both the House and the Senate expressly considered the question of whether local governments should be authorized to regulate pesticides and, although there was an interim disagreement between two Senate committees on the issue, the legislation as finally enacted by the Senate and the House did not include the proposed language, clearly focused upon in both chambers, which would have authorized local pesticide regulation. Principled decision-making and respect for the integrity of the legislative process compel the conclusion that Congress knew and meant what it was doing.

Mortier, 154 Wis. 2d at 31, 452 N.W.2d at 560-61 (I Pet. App. A at 27-28) quoting *Maryland Pest Control Ass'n v. Montgomery County*, 646 F. Supp. 109, 113 (D.C. Md. 1986), *aff'd without opinion* 822 F.2d 55 (4th Cir. 1987). *Accord: Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929 (6th Cir. 1990) *petition for cert. filed*, No. 90-382.[21]

C. The Weight of Authority Supports a Finding of Preemption.

This case cannot be resolved merely by counting prior opinions on one side of the issue or the other. Nevertheless, the weight of authority to date has favored preemption. In addition to the Wisconsin Supreme Court opinion in this case

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[21] Subsequent Legislative action confirms the Congressional intent to preempt. While, "expressions of a subsequent Congress generally are not thought particularly useful in ascertaining the intent of an earlier Congress," *Pacific Gas & Elec.*, 461 U.S. at 211 n.23; there are times when it may yet be instructive. *Id.* at 211-213; *see also Andrus*, 446 U.S. at 666-72 (1980); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1960); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974). Here, prior to enactment of the 1988 Amendments to FIFRA (Federal Insecticide, Fungicide and Rodenticide Act Amendment of 1988, Pub. L. No. 100-532, 102 Stat. 2654), the House held a full day of hearings on the specific issue of whether local governments should regulate pesticides. H.R. Rep. No. 13, 100th Cong., 1st Sess. 479-654 (1987). Despite several requests to add an amendment to specifically authorize local regulation, the House failed to do so. A subsequent Senate Bill, S. 1524, 100th Cong., 1st Sess. (1987), authorizing local regulation was similarly defeated. Thus, the 1988 Amendments reaffirm the basic federal-state regulatory scheme and reject independent local regulation.

and an early opinion from a New York appellate court,[22] the only two federal circuit court of appeals decisions on this issue have found preemption. *See Milford* and *Maryland Pest Control* discussed at pp. 26-27, *supra*.[23]

On the other side of this issue are the opinions of two other state courts, *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990) and *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984). In addition, the federal district court in *Coparr, Ltd. v. City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989), *appeal docketed*, No. 89-1341 (Nov. 1, 1989, 10th Cir.) *appeal stayed* (Jan. 15, 1991) issued a decision concluding FIFRA preempted independent local enforcement of FIFRA, but did not preempt a local notification requirement.

The opinion of federal courts of appeals on questions of federal law should be entitled to greater deference than opinions of state courts or federal district courts. In addition, the decisions in *Central Maine* and *Coparr* both rely heavily on the faulty analysis of the 4-3 majority opinion of the California Supreme Court in *County of Mendocino*. The *County of Mendocino* decision was immediately overruled by the California legislature which

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[22] *Mortier v. Town of Casey*, discussed at p. 7, *supra*; *Long Island Pest Control Assoc., Inc. v. Town of Huntington*, 72 Misc. 2d 1031, 341 N.Y.S.2d 93 (1973), *aff'd*, 43 App. Div. 2d 1020, 351 N.Y.S.2d 945 (1974).

[23] Furthermore, no fewer than five state attorneys general have issued formal opinions concluding that FIFRA preempts local regulation. 1989 Op. Atty. Gen. Ark. 89-212 (1989) (Arkansas); 1990 Op. Atty. Gen. Iowa 90-6-3 (1990) (Iowa); 1970-77 Op. Atty. Gen. La. 324 (1978) (Louisiana); 1988 Op. Atty. Gen. Md. 88-006 (1988) (Maryland); 70 Op. Atty. Gen. Md. 161 (1985) (Maryland); 41 Op. Atty. Gen. Ore. 21 (1980) (Oregon).

enacted a statewide program.[24] Moreover, the majority opinion ignored the statutory structure of FIFRA and utilized "specious" reasoning in dismissing FIFRA's legislative history. *County of Mendocino, supra*, 36 Cal. 3d at 499, 683 P.2d at 1165, 204 Cal. Rptr. at 912 (Kaus, J., dissenting).

Similarly, the opinion of the Environmental Protection Agency ("EPA") submitted in the Solicitor's brief is not entitled to deference. It is with some surprise that Respondents find EPA now endorsing local regulation because the only published position of EPA is to the contrary. In 1975, shortly after FIFRA was amended, EPA promulgated interpretive regulations for State plans to certify pesticide applicators. In its comments to 40 C.F.R. § 171.7(a) (1975), EPA agreed that FIFRA preempts independent local regulation.

> **Section 171.7(a).** A State agency suggested that one word ("State") in this provision be changed to ("governmental") to allow for the inclusion of other cooperating agencies. This revision has been made to provide for the naming and describing of other agencies involved in certification programs.
>
> This change is made only to accommodate a State needing the assistance of local authorities in implementing and maintaining its certification programs, and *provided that such assistance is uniform throughout the State and is totally responsive to State direction. It is not the intention of the Act or these regulations to authorize political subdivisions below the State level to further regulate pesticides.*

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[24] *See* Cal. Food and Agric. Code § 11501.1 (West 1986). The enabling legislation, 1984 Cal. Stat. c. 1386 § 3, provided that, "It is the intent of the Legislature by this act to overturn the holding of *People ex rel. v. Deukmejian v. County of Mendocino* ..."

40 Fed. Reg. 11,700 (1975) (emphasis added). The amended language to which this EPA comment was directed was then codified in the Code of Federal Regulations, where it has remained unchanged to this day. *See* 40 C.F.R. § 171.7(a) (1988).[25]

Now in the context of this lawsuit EPA has reversed itself. The Solicitor first attempts to explain this reversal by asserting that FIFRA's regulation of pesticide applicators under § 136i(a)(2) is "fundamentally different" than regulation of pesticide use under § 136v(a). U.S. Br. at 22 n.20. Yet, the Solicitor does not articulate why local regulation of pesticide applicators is preempted while the broader authority to regulate pesticide use (which can also impact applicators) is not preempted. Failing to articulate a rationale for the asserted distinction, the Solicitor simply claims that EPA's earlier position "could have been more precise" and that in any event EPA has now changed its mind. *Id.*

While published policies and regulations of an agency may be entitled to deference, *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), such deference is not warranted where an agency's interpretation conflicts with the agency's earlier interpretation. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). Here, EPA's new position has even less value because it has been announced in the context of this action. As this Court has noted, "courts may not accept appellate counsel's *post hoc* rationalization for agency [action]." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988); *Motor Vehicle*

[25] This construction of FIFRA by EPA also is consistent with Respondent's construction of the "cooperation" language of § 136t(b). Coordination is helpful between the State and local authorities in "implementing and maintaining its certification programs." *Id.*

Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983).[26]

D. The Preempted Field Does Not Unduly Restrict State or Local Authority.

Petitioners and various *amici* argue that preemption of local pesticide regulation unduly restricts both state and local authority. This argument is based on a mischaracterization of the preempted field. Petitioners incorrectly assume that the preempted field precludes any role for local governments. The preempted field is limited to the enactment of independent regulation of pesticides by local government. The preempted field does not preclude the states from delegating authority to local governments to administer and enforce the state's program. Nor does it preclude local governments from regulating in areas outside of the preempted field such as groundwater protection regulations.

1. The Preempted Field Does Not Unduly Restrict a State's Authority to Delegate Functions to Local Governments.

Petitioners' "Tenth Amendment" argument is based on two incorrect assumptions: (1) that the preempted field would preclude the states from delegating any functions to local governments, and (2) that it is impermissible for Congress to place *any* restriction on a state's ability to delegate functions to its local governments.

[26] This lack of deference is also consistent with the general proposition that an agency's construction of statute soon after enactment is entitled to more weight than a construction developed years after the fact. *Rice v. Rehner*, 463 U.S. 713, 730 n.13 (1983); *See also Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933).

First, FIFRA does not preclude all delegation to local governments. The field preempted by FIFRA still allows a state to delegate authority to local governments to administer and enforce a *state* program. The primary restriction is that the program must be a *state* program. It is the operation of an independent local program operating under its general police powers unsupervised by the state that the Wisconsin Supreme Court preempted. *Mortier*, 154 Wis. 2d at 32, 452 N.W.2d at 561 (I Pet. App. A at 28-30). A state can, however, specifically delegate a wide variety of functions to local government including administration, education, training, monitoring and enforcement.[27]

California, the nation's largest agricultural state, provides a useful example. Under California's framework, the County Agricultural Commissioner is utilized to administer a comprehensive state program. Among other things, the Commissioner may issue local pesticide use permits subject to state standards and state review. Cal. Food & Agric. Code, §§ 14006.5, 14009 (West 1986).[28]

Thus, the existing federal-state scheme allows states to utilize local knowledge in the implementation of a state

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[27] Thus, to a large extent, a state can choose to assign duties "to counties to carry out state policies, standards or programs" as the Petitioner urges. Pet. Br. at 95.

[28] Although the County Commissioner may propose additional regulations for his or her county, Cal. Food & Agric. Code, § 11503 (West 1986), such regulations remain state regulations because they are only effective after express approval of the State. State review and approval determines the "necessity, authority, clarity and consistency of the regulation." *Id.* Such a program is also consistent with the fact that a state can enact regulations that apply to portions of the state rather than statewide. *See* Wis. Admin. Code § Ag 29.17 (restricting the use of aldicarb to certain counties in Wisconsin) and Wis. Admin. Code ch. Ag 30 (eff. April 1, 1991) restricting the use of atrazine in certain local "management areas."

program.[29] It merely prohibits independent local regulation operating outside of that scheme.

Just as the Petitioner overstates the preemptive scope of FIFRA, so too the Petitioner overstates the restrictions imposed by the Tenth Amendment. The Tenth Amendment does not preclude Congress from preempting certain local regulations. This Court has observed that, "for purposes of the supremacy clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712 (1985). *See also City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

Moreover, Congress' authority to preempt any regulation in a given field includes the more limited authority to preempt certain local regulation in that field.[30] Even the Solicitor admits that Congress could have preempted all pesticide regulation:

> In contrast to cases such as *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), there is no contention here that Congress is not constitutionally empowered to prohibit all state and local regulation of the particular subject matter involved in this litigation.

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[29] *Cf.* Conservation Law Fd. Br. at 30-32.

[30] *See FERC v. Mississippi*, 456 U.S. 742, 765 (1982) where the Court noted:

> ... Congress could have preempted the field ... ; PURPA should not be invalid simply because out of deference to state authority, Congress adopted a less intrusive scheme and allowed the states to continue regulating in the area on the condition that they consider the suggested federal standards.

U.S. Br. at 23 n.21.[31] Thus, even if this Court is interested in reexamining *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), this is not the case to do so.

Finally, there are several areas where Congress has allowed for state regulation but has precluded or restricted local regulation. For example, the Federal Railroad Safety Act of 1970, § 205, Pub. L. No. 91-458, 84 Stat. 972 (codified as amended at 45 U.S.C. § 434 (1988)) provides for national safety standards, but allows states to adopt additional regulations. Under this scheme, local governments are precluded from enacting independent regulations. *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir. 1973).[32] Similarly, the National Labor Relations Act of 1947, § 14(b), 61 Stat. 151 (codified as amended at 29 U.S.C. § 164(b) (1988)), allows state regulation of union security agreements, but preempts local regulation because "a myriad of local regulations would create obstacles to Congress' objectives under the NLRA." *Local 1564 v. City of Clovis*, 735 F. Supp. 999, 1002 (D.N.M. 1990). Even the Solicitor notes numerous examples of where the federal government conditions grant moneys on a state having a state-wide plan. U.S. Br. at 24 n.21. Thus, the restrictions on independent local pesticide regulations under FIFRA are neither unique nor improper.

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[31] *Cf.* Hawaii Br. at 16-18.

[32] Contrary to the Petitioners' assertion, the rail cases are not "completely different." Pet. Br. at 99 n.34. As set forth in Section III, *infra*, like the rail cases, FIFRA has, as a special feature, a coordinated federal-state scheme which precludes independent local regulation.

2. *The Preempted Field Does Not Unduly Restrict Local Zoning Authority or Interfere With the Safe Drinking Water Act.*

Preemption of one field by an act of Congress does not preclude a state or local government from acting in another field, provided that there are only incidental impacts on the preempted field. For example, in *Pacific Gas & Elec.*, *supra* at p. 19, this Court held that "the federal government has occupied the field of nuclear safety concerns." 461 U.S. at 212. However, in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court held that a state may award damages based on its own tort law for those injured by nuclear incidents, notwithstanding the fact that such awards may have some regulatory impact. *Id.* at 256. Similarly, in *North Dakota v. U.S.*, 110 S. Ct. 1986 (1990), this Court held that a federal procurement law did not preempt state laws which "incidentally raise[d] the costs to the military." *Id.* at 1998.

Here, the field preempted by Congress is the independent regulation of pesticides by local government. Local units of government retain their traditional powers in other fields. There may be a variety of actions by local governments in these other fields which would not be preempted if their impact on pesticide regulation was incidental.[33]

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[33] In this regard, Respondents agree with amici Village of Milford, et al. Br. at 25-28. Respondents disagree, however, as to the full range ordinances which have an incidental impact. Clearly, in *Milford*, discussed at pp. 26-27, *supra*, the Sixth Circuit found notice and posting ordinances to be regulatory ordinances with more than an incidental impact on pesticide use. Here, however, there is no dispute that the Casey ordinance has more than an "incidental impact." Amici for the Village of Milford note, "The concern [prompting Congressional

(continued...)

For example, a basic local zoning decision that changes a parcel from an agricultural zone to a commercial zone may impact the amount and type of pesticides used on the property. Such an impact, however, is clearly incidental and not preempted.

Similarly, a local decision taken in accordance with the wellhead protection program of the Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, 100 Stat. 642 (codified as 42 U.S.C. § 300, *et seq.* (1988)), could preclude the use of a variety of inorganic and organic chemicals in a defined area to protect a wellhead area. If pesticides are among the restricted chemicals, there may be an incidental regulatory impact on pesticides, but the program itself operates outside of the preempted field.

Moreover, like FIFRA, the wellhead protection program is primarily designed to operate through "States." 42 U.S.C. § 300h-7 (1988) creates "State programs to establish wellhead protection areas" to be approved by EPA. The state program must "specify the duties of ... local government entities," § 300h-7(a)(1), but the program remains a state program under direct state control. Thus, this program can remain coordinated with state pesticide regulations.

E. The Town of Casey Ordinance Falls Within the Preempted Field.

The Town of Casey ordinance clearly falls within the preempted field. The ordinance is not part of a state

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33 (...continued)
discussion of preemption] applies only to the very few local regulations that require complex scientific determinations such as the banning or restricting the use of a pesticide." Village of Milford Br. at 28. The Casey ordinance is such an ordinance.

pesticide program. It is instead an independent regulatory scheme enacted under the Town's general police powers.

There is no dispute that the Town of Casey ordinance stands as a wholly separate and independent regulatory scheme from the state program. The ordinance requires a permit prior to any pesticide use apart from the federal and state programs. The permit application process, the criteria for permit issuance and the ultimate decision by the Town Board all are independent of the federal and state programs to register pesticides and license pesticide applicators.

Indeed, Petitioners promote the independence of this program. They claim that because federal and state programs are "incomplete," the Town of Casey should be entitled to act on its own to fill in "gaps that neither federal nor state laws address." Pet. Br. at 69. It is precisely this type of independent regulation that Congress intended to preempt by limiting regulation to states.[34]

III. THE TOWN OF CASEY ORDINANCE CONFLICTS WITH FIFRA.

Even where Congress has not preempted an entire field, state and local laws are preempted to the extent that they conflict with federal law. Such a conflict can arise when "the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v.*

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34 Significantly, Hawaii, et al. acknowledge that, "there is good reason for FIFRA not to directly authorize local governments to regulate, for doing so could mean that local governments would be able to regulate even if the State did not want them to ..." Hawaii Br. at 6. Yet, absent an affirmative preemptive action by a state, Hawaii's construction of FIFRA would indeed allow a local government to regulate even if a state did not want them to. As noted in Section III, *infra*, an ordinance like the Casey ordinance could, for example, directly interfere with Wisconsin's efforts to control such pests as the gypsy moth.

Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)), or when "local regulation ... would frustrate the federal scheme." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

An assessment of whether a conflict exists necessarily requires a comparison of the "purposes and objectives" of the federal law with the state or local law at issue. *See, e.g., California v. ARC America Corp.*, 109 S. Ct. 1661, 1665-68 (1989); *Transcontinental Pipeline v. Oil & Gas Board*, 474 U.S. 409 (1986); *Silkwood, supra*, 464 U.S. at 257.

As in a field preemption type challenge, ascertaining the purposes and objectives of Congress in a conflict analysis requires a review of the express language used by Congress in the statute, together with a review of its structure and purpose, including legislative history. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985).[35] A review of FIFRA and its legislative history reveal three interrelated purposes and objectives of FIFRA. The Town of Casey ordinance stands as an obstacle to and frustrates the accomplishment of each of those objectives.

A. The Casey Ordinance Stands As an Obstacle to the Goal of Coordinated Pesticide Regulation.

The statutory scheme of FIFRA emphasizes the need for a coordinated national program. As set forth above, the primary vehicle to assure coordination was the limitation of regulatory authority to the federal government and states.

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[35] *See also Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990); *California v. FERC*, 110 S. Ct. 2024 (1990); *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493 (1989); *Transcontinental Gas Pipeline, supra, Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).

Independent and uncoordinated regulation by local governments would defeat that scheme. In addition, to assure a coordinated national program, Congress also enacted § 136t(b) to assure that EPA would work with states and their political subdivisions in "securing uniformity of regulations."

The legislative history of FIFRA also emphasizes the Congressional intent to have coordinated pesticide regulation. When the House Committee on Agriculture issued its report on H.R. 10729, it began by highlighting the need for a coordinated federal state system.

> In so changing old FIFRA, the new statute would contain the following main provisions:
>
> 1. It establishes a coordinated federal-state administrative system to carry out the new program. The states are given prime responsibility for the certification and supervision of pesticide applicators. The federal government sets the program standards the states must meet. State authority to change federal labeling and packaging is completely preempted, and state authority to further regulate "general use" pesticides is partially preempted.

H.R. Rep. No. 511, 92 Cong., 1st Sess. 1-2 (1971) (emphasis added).[36]

The Town of Casey ordinance interferes with the type of coordinated federal-state program envisioned by Congress. As noted above, the Town of Casey ordinance is a wholly independent regulatory scheme which is not coordinated in any respect with either federal or state law. To allow the Town of Casey ordinance to stand, and to invite the 83,200

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[36] *See also* 117 Cong. Rec. 40,067 (1971) (remarks of Rep. Mizell, Nov. 9) (FIFRA establishes a "coordinated Federal-State administration system to control the application of pesticides.").

local units of government[37] throughout the country to also enact their own unique and independent set of pesticide regulations would not only frustrate Congress' goal of coordination, it would render that goal an impossibility.[38] As the 6th Circuit noted in *Professional Lawn Care Ass'n v. Village of Milford*, 909 F.2d 929, 934 (6th Cir. 1990):

> [A]doption of the *Mendocino County* view would allow the uniformity and comprehensiveness Congress sought to establish through FIFRA to be lost in the muddle of thousands of local standards and regulations. FIFRA would no longer stand as a sweeping federal regulatory framework but would become the lowest common denominator in an equation of infinite variables.

B. The Casey Ordinance Stands As an Obstacle to the Effective Regulation and Use of Pesticides.

In enacting FIFRA, Congress recognized the value of pesticides along with the need to create a regulatory structure which could protect the public health, welfare and environment from the improper use of pesticides. The House Agriculture Committee noted:

> The Committee acknowledges that the wise use of pesticides has saved millions of lives by controlling insect vectors of diseases such as malaria and typhus, and the Nation as a whole has benefitted tremendously from the efficiency of insect and weed control made

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[37] United States Department of Commerce, Statistical Abstract of the United States, 1990 at 271-72 (11th ed.).

[38] *Accord: Local 1564 v. City of Clovis*, 735 F. Supp. 999, 1002-1003 (D.N.M. 1990) ("[T]he diversity that arises from different regulations among various of the 50 states and the federal enclaves ... is qualitatively different from the diversity that would arise if cities, counties and other local government entities throughout the county were free to enact their own regulations).

> possible by agricultural applications of pesticides of various sorts.
>
> But on the other hand, there is evidence of diminished effectiveness of control and increased undesirable effects on non-target and beneficial organisms resulting from indiscriminate use and abuse of invaluable pesticides.

H.R. Rep. No. 511, 92d Cong., 1st Sess. 4 (1971); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 990-992.

A special feature of the federal-state regulatory scheme created by Congress is that it provides the necessary expertise and regional perspective for effective regulation while still allowing local needs to be met. The Casey ordinance thwarts this Congressional purpose in two critical respects.

1. The Casey Ordinance Creates Regulatory Authority Without Regard For Expertise.

Congress provided regulatory authority to those agencies with the necessary technical expertise to ensure effective regulation. The 1972 Amendments to FIFRA transferred control of pesticide regulation from the U.S. Department of Agriculture to the EPA. The 1988 Amendments attempted to bolster EPA's program by providing additional authority to reregister pesticides as well as additional resources through the imposition of registration and maintenance fees. H.R. Rep. No. 939, 100th Cong., 2d Sess. 29, *reprinted in* 1988 U.S. Code Cong. & Admin. News at 3478.

Moreover, Congress also recognized that states may have the expertise to allow them to adapt regulations to meet local needs. States may permit the use of a registered pesticide for a special local need which was not originally contemplated when the pesticide was registered by EPA under § 136v(c). States may also impose stricter pesticide

restrictions to account for sensitive local conditions under § 136v(a).[39]

Congress anticipated that many local units of government simply do not have "the financial wherewithal [to] provide necessary expert regulation comparable with that provided by the state and federal governments." 1972 U.S. Code Cong. & Admin. News at 4008. Certainly, that is a legitimate concern where small rural town boards are asked to independently review applications for pesticide use without the benefit of the staff or resources to do so.

2. *The Casey Ordinance Creates Regulatory Authority Without Regard for State or Regional Interests.*

Apart from the issue of local expertise, there looms an even more significant concern. Local units of government are by definition limited jurisdictions and have a focus that is confined to local needs. While this local perspective can in some instances be helpful, in other cases, it can result in parochialized decision-making.[40] Here, a parochial view can easily result in the "not-in-my-back-yard" syndrome which is especially problematic in pesticide regulation. Restrictions on pesticides by one jurisdiction could allow a pest, which could have been easily controlled through a limited pesticide application, to spread to neighboring jurisdictions. At that point, control of the pest could well mean the use of additional pesticides over much larger areas. Thus, a parochial view of pesticide regulation can not only

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[39] Wis. Admin. Code § Ag 29.17 and ch. Ag 30, discussed *supra* at 3-4.

[40] Clearly, there are times when parochial local government interests must give way to broader national concerns. *See Brown v. Bd. of Education*, 347 U.S. 483 (1954).

shift the use of pesticides to "somebody else's backyard," but in so doing exacerbate the problem that must be addressed.[41]

The potential impact of such a parochial view can be demonstrated by three well publicized recent pest problems. One well documented problem is the gypsy moth infestation. As a result of the spread of this pest, the U.S. Department of Agriculture has established domestic quarantine areas where there has been gypsy moth infestation. *See* 7 C.F.R. § 301.45(a) (1990). The gypsy moth is a "dangerous insect injurious to forests and shade trees." *Id.* A portion of the "Gypsy Moth ... Program Manual" is appended to these regulations. This manual notes that, "proper timing of [pesticide] application is essential and is difficult to maintain in a large program." 7 C.F.R. § 301.45, App. IV.D.2. Generally, eradication programs require two applications 7-14 days apart where larvae are active and may require aerial applications. *Id.* A Casey type ordinance, with a 60 day permit application requirement and limits on aerial spraying could preclude effective treatment of the gypsy moth.

In the California area, the mediterranean fruit fly or medfly threatened to destroy large portions of California's multi-million fruit and produce industry. *See* 7 C.F.R. § 301.78 (1990) for quarantine areas. If local units of government could restrict pesticides necessary to control the

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[41] Thus, the regulation of pesticides stands on different footing than other environmental statutes. *Cf.* Conservation Law Fd. Br. at 15-30. More restrictive local regulations for air, water, solid and hazardous wastes may force a source to move from one area to another, but such relocations do not have the potential to exacerbate the potential environmental or public health and welfare impacts.

medfly, the problem could spread.[42] Perhaps an even more critical problem was presented by the encephalitis outbreak in Florida borne by mosquitos. Again, untreated areas could have served as refuges for the infected mosquitos.

On a less dramatic, but more pervasive scale, independent local regulations could jeopardize efforts to limit pesticides through integrated pest management (IPM).[43] IPM is a concept which integrates a variety of tactics for the control of pests including improved cultivation practices, use of pest resistent crops, biological controls and sophisticated pesticide application.[44] Under IPM, pesticides are not routinely applied in anticipation of pests. Instead, crops are carefully monitored and pesticides are used in a carefully timed and focused manner only where a specific pest problem has been identified.[45] Even the

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[42] *See*, J. Carey, *Demography and Population Dynamics of the Mediterranean Fruit Fly*, 16 Ecol. Model. 125 (1982) ("[T]he probability of a medfly population becoming established from only a few founding individuals appears to be quite high."). *Id.* at 125.

[43] The value of IPM is reflected in the fact that FIFRA expressly provides that instructional materials concerning integrated pest management techniques must be made available upon request to individuals seeking certification as pesticide applicators. 7 U.S.C. § 136i(c).

[44] *See Alternative Agriculture*, National Research Council Board on Agriculture, National Academy Press (1989), p. 176; M. Barrett and W. Witt, *Maximizing Pesticide Use Efficiency, Energy in World Agriculture: Energy in Plant Nutrition and Pest Control*, Elsevier (1987), pp. 234-35.

[45] *See, e.g.*, D. Gadoury, Wm. MacHardy, D. Rosenberger, *Integration of Pesticide Application Schedules for Disease and Insect Control in Apple Orchards of the Northeastern United States*, 73 Plant Disease 98 (Feb., 1989), pp. 176-77; R. Doersch, et al., *Management Principles for the Wisconsin Farmer*, UW Extension (1988), pp. 11-13.

Petitioner has claimed that "Integrated Pest Management (IPM) is an indispensable component of any effort to help farmers and other pest managers control pests, while reducing pesticide contamination of our waters."[46]

Yet, IPM becomes unworkable under ordinances such as the Casey ordinance. Casey's requirement that a permit application be submitted 60 days prior to pesticide use effectively precludes the use of pesticides on short notice in response to a specific pest. Under the Casey ordinance, pesticides must be applied in anticipation of pests rather than in response to pests.

The problem of parochial pesticide regulations was avoided when Congress created a federal-state scheme which subordinates such parochial interests to federal and state control. Congress clearly viewed "the 50 states and federal government [as] provid[ing] sufficient of jurisdictions to properly regulate pesticides." 1972 U.S. Code Cong. & Admin. News at 4008. Disruption of this structure could have dire consequences for the protection of public health, welfare and the environment.[47] In short, ordinances like

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[46] *See*, R: 6, Motion of State of Wisconsin Public Intervenor to Intervene, Ex. A: T. Dawson, *Overview of Ground and Surface Water Contamination by Pesticides*, presented at National Governors' Association Committee on Energy and Environment State Integrated Toxics Management Conference, San Diego, California, September 20, 1984, p. 17.

[47] It is perhaps not surprising that most courts which have reviewed the question of whether local ordinances are preempted by a *State* pesticide program have found local ordinances to be preempted. *Ames v. Smoot*, 98 A.D.2d 216, 471 N.Y.S.2d 128 (1983); *Long Island Pest Control Association, Inc. v. Town of Huntington*, 72 Misc. 2d 1031, 341 N.Y.S.2d (1973), *aff'd* 43 A.D.2d 1020, 351 N.Y.S.2d 945 (1974); *Pesticide Public Policy Foundation v. Village of Wauconda*, 622 F. Supp. 423 (N.D. Ill. 1985) *aff'd* 826 F.2d 1068 (7th Cir. 1987); *Town*

(continued...)

Casey's not only conflict with FIFRA, they simply are not "good government."

C. The Casey Ordinance Stands As an Obstacle to the Goal of Avoiding an Undue Burden on Interstate Commerce.

As with many legislative decisions, FIFRA reflects a balance of competing public policy interests. FIFRA was designed to provide for a more effective means of regulating pesticide use while acknowledging that pesticides continue to serve useful and necessary functions in society.

The decision to preclude independent local regulations was based in part on the concern that further regulations would unduly impact interstate commerce. As the Senate Agriculture and Forestry Committee noted:

> On this basis and on the basis that *permitting such regulation would be an extreme burden on interstate commerce,* it is the intent that Section 24, by not providing any authority to political subdivisions and other local authorities of or in the states, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.

S. Rep. No. 838, 92d Cong., 2nd Sess., *reprinted in* 1972; U.S. Code Cong. & Admin. News at 4008 (emphasis added).

The Town of Casey ordinance also stands as an obstacle to this goal of FIFRA. By allowing local regulation of pesticides, the balance has been altered in a way that

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[47] (...continued)
of Wendell v. Attorney General, 394 Mass. 518, 476 N.E.2d 585 (1985); *Town of Salisbury v. New England Power Co.*, 121 N.H. 983, 437 A.2d 281 (1981).

dramatically increases the burdens on interstate commerce.

Although this case is not before the court on a commerce clause claim, the basic parameters of the ordinance demonstrate a number of ways in which it serves to potentially burden interstate commerce. As noted above, the Casey ordinance could increase crop loss by enabling an insect or fungus to rapidly spread into other jurisdictions in the intervening time.

In addition to crop loss, there is the burden of administrative costs. The administrative costs for completing a single permit application, attending a public hearing and seeking an appeal is probably not burdensome in and of itself. But a regulatory scheme which allows each jurisdiction to impose its own conflicting type of pesticide use regulations could quickly impose substantial administrative costs.

Among the members of the coalition which joined respondent Mortier in challenging the Casey ordinance are companies which must maintain rights of way over long distances throughout northern Wisconsin. If in maintaining a utility or railroad right-of-way it would be necessary to apply for a different permit for each jurisdiction its right-of-way passed through, it could well impose substantial burdens on interstate commerce.

As noted above, it is not the purpose of this brief to make this a commerce clause case. However, it is precisely this type of question which Congress sought to avoid by establishing a federal-state scheme of regulation which did not allow for independent local regulation of pesticides.[48]

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[48] Significantly, the House Agriculture Committee rejected the type of permitting program enacted by the Town of Casey precisely because of its burden on interstate commerce:

(continued...)

The Town of Casey ordinance and other ordinances like it therefore stand as an obstacle to a third major goal of FIFRA.

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48 (...continued)
H.R. 4152, the Administration's legislative proposal requested authority to designate a pesticide in one of three classifications namely "for general use," "for restricted use", "for restricted use", or "for use by permit only". *Pesticides designated for "use by permit only" would have required "approval in writing for the amount and type of article for each particular application"* of an "approved pest management consultant" licensed by a State. The Committee gave this proposal of a third classification and requirement for pest management consultant very careful consideration. *The Committee found this proposal would place on the Administrator and users an unworkable and costly burden far in excess of need or benefits gained by such regulatory machinery.*

H.R. Rep. No. 511, 92d Cong., 1st Sess. 15 (1971) (emphasis added).

CONCLUSION

Because the Town of Casey ordinance is preempted by or in conflict with FIFRA, the judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

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